with the 1967 Income Tax Act, with the latter's global approach to the computation of profits for the purposes of the charge to Malaysian income tax. (As I understand the situation it was temporary, there having been since a reversion to the 1947 Ordinance approach to chargeable income.)

By section 45 of the 1947 Ordinance the 1966 Double Taxation Agreement Order was given legislative operation notwithstanding anything in any written law of Malaysia: that is accepted.

Article IV. 1(a) of the 1966 Order Agreement provided that the profits of the Singapore establishment might be taxed in Singapore, and that no further tax should be imposed upon such profits even when remitted to Malaysia. That made it clear that Malaysian tax was not to be imposed on profits of the Singapore establishment at all. Profits of the Singapore establishment were to be wholly irrelevant to Malaysian tax. Similarly in Article XVII. 2 it was provided that where a resident in Malaysia derives income from a source within Singapore, and that income is subject to tax in Singapore, Malaysia shall exempt such income from Malaysian income tax.

The views of the majority of their Lordships turn entirely upon the content of Article XVII. 1 of the 1966 Double Taxation Agreement.

"The laws of each Contracting State shall continue to govern the taxation of income in that State except where express provision to the contrary is made in this Agreement. Where income is subject to tax in both Contracting States, relief from double taxation shall be given in accordance with the following paragraphs of this Article."

It is said that this means that the global assessment of nett income under the 1967 Act continues to apply including the ability to set Singapore establishment losses against profits in Malaysia of the business, and that there is no *express* provision denying this. There is nothing express here except reference to income or profits from the Singapore establishment, and therefore nothing to deny the deduction (on the Malaysian global law approach) of losses at the Singapore establishment against the profits in Malaysia. The articles referred to relate only to profits of the Singapore establishment, and there were none: there were only losses. This is the crucial point, at which I respectfully part company with the majority of their Lordships.

I am not aware of any fiscal system of exemption from tax of a source of income which accepts losses from that source as a permissible deduction from other sources of income for the purpose of ascertaining nett taxable income. None was suggested to the Board. The 1947 Income Tax Ordinance, as explained, was to the contrary. Such a suggestion would seem to me to be quite contrary to any principle underlying fiscal systems of taxation of profits. If profits from a source of income are exempted from tax, of what concern to the taxing authority can be outgoings of that source, whether they do or do not exceed incomings? Their exclusion from consideration appears to me to be necessarily involved in the exemption from tax. Suppose that in section 3(a) of the Income Tax Act, 1967, after the words "income from wherever derived" there had occurred the words "except in the case of the Hock Heng Company income derived from its establishment in Singapore". I could not accept that in such case the appellant company could claim to offset losses at the Singapore establishment against its profits elsewhere by asserting that in the exception exemption there was no express statement that such losses could not be set off. A charging section, and an exemption provision, from their very nature are not appropriate to an express reference to losses. The effect of Articles IV and XVII cannot be different from the effect which in my opinion would necessarily be attributed to section 3 of the 1967 Act had it contained the words that I have suggested — viz.: that Singapore losses become necessarily as irrelevant to Malaysian taxation as are Singapore profits.

It is accepted by the majority of their Lordships that if their decision is correct the losses of the Singapore establishment can be carried forward not only against profits in Malaysia but also against future profits of the Singapore establishment. There is the further problem that if their Lordships' decision is correct there may be a situation in which according to Singapore tax law there is a profit there, but a loss according to Malaysian tax law. Both strange results.

I conclude, therefore, that the inability to set off losses in the Singapore establishment, being necessarily dependent upon the express prohibition to charge its profits to Malaysian tax, is the subject of an express provision contrary to the Malaysian 1967 Income Tax Act. I would for myself dismiss the appeal.

*Appeal allowed.*

Solicitors: *Slaughter & May; Stephenson Harwood.*

## PRIVY COUNCIL APPEAL

### LEE KOK KENG v. PUBLIC PROSECUTOR

**[Federal Court Criminal Appeal No. 8 of 1975]**

The petition by the appellant abovenamed for special leave to appeal *in forma pauperis* to His Majesty the Yang di-Pertuan Agong in the above Appeal ([1976] 1 M.L.J. 125) has been dismissed by the Privy Council on October 26, 1978.